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06 UNITED STATES DISTRICT COURT  
07 WESTERN DISTRICT OF WASHINGTON  
08 AT SEATTLE

09 PROVIDENCE HEALTH & )  
10 SERVICES-WASHINGTON, a ) CASE NO. C09-1668TSZ  
11 Washington nonprofit corporation; et al., )  
12 )  
13 Plaintiffs, ) ORDER  
14 )  
15 v. )  
16 )  
17 J. DAVID BENSON, )  
18 )  
19 Defendant. )  
20 \_\_\_\_\_ )

21 This matter comes before the Court on Defendant's Motion for Award of Attorney Fees,  
22 docket no. 75. Having reviewed the papers filed in support of, and opposition to, Defendant's  
motion, the Court DENIES Defendant's motion.

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**I. BACKGROUND**

On October 10, 2008, Defendant Benson was injured in a motorcycle accident. Order  
(docket no. 62). Although he recovered \$25,000 from the tortfeasor's insurance company, this

01 amount was less than his total medical expenses. Id. To pay the remainder of his expenses,  
02 Benson submitted a claim to his insurance company, which was denied. As a result, Benson  
03 brought suit against Providence Health Services in state court. Benson v. Providence Health  
04 Services, C10-941Z (“Benson I”). Providence Health Services removed that case to federal court,  
05 alleging that the insurance plan was governed by the Employee Retirement Income Security Act  
06 (“ERISA”). Benson moved to remand the case, arguing that the plan was exempt from ERISA.  
07 On November 30, 2010, this Court remanded the case back to state court, finding that the plan was  
08 exempt from ERISA. Order (Benson I, docket no. 25). In Benson I, the Court denied Benson’s  
09 request for attorneys’ fees.  
10

11 In the present case, Providence Health Services’ subsidiaries, Providence Health and  
12 Services Washington and Providence Health Plan, brought a declaratory judgment action against  
13 Benson seeking to establish that the plan was governed by ERISA. Complaint (docket no. 1). On  
14 March 23, 2011, this Court denied Plaintiffs’ motion for partial summary judgment. Order  
15 (docket no. 62). On May 10, 2011, the Court denied Plaintiffs’ motion for reconsideration and  
16 dismissed Plaintiffs’ remaining claims with prejudice. Order (docket no. 73). Defendant Benson  
17 now timely moves for \$137,295 in attorneys’ fees.

## 18 **II. DISCUSSION**

19 Defendant argues that he is entitled to attorneys’ fees under Fed. R. Civ. P. 54(d)(2) and  
20 Olympic Steamship Co. v. Centennial Ins. Co., 117 Wn.2d 37, 54 (1991). Unfortunately, he is not.  
21 Unlike Rule 54(d)(1), which affirmatively authorizes costs to the prevailing party, Rule 54(d)(2)  
22 gives only a procedure for awarding attorneys’ fees; the movant must point to a statute or contract

01 to show that attorneys' fees are available in order to overcome the default rule that "the prevailing  
02 litigant is ordinarily not entitled to collect a reasonable attorneys' fee from the loser." Alyeska  
03 Pipeline Serv. Co. v. Wilderness Soc'y, 421 U.S. 240, 247 (1975).

04 Defendant's argument that he is entitled to fees under Olympic Steamship, a Washington  
05 Supreme Court case holding that fees are available to an insured when the insurer refuses to pay a  
06 justified claim, is unhelpful in this action brought only on federal question jurisdiction, where no  
07 state law claims have been brought. Defendant does not claim fees under ERISA, or any other  
08 federal statute, nor does Defendant point to any cases that support a fee award under Olympic  
09 Steamship in a case brought under ERISA. An independent search of Ninth Circuit cases by the  
10 Court reveals no case where a federal court has awarded Olympic Steamship fees in an action based  
11 only on federal question jurisdiction.  
12

13 Defendant's cite to Safeco Ins. Co. v. Woodley, 150 Wn.2d 765 (2004), a Washington  
14 Supreme Court decision holding that attorneys' fees are available for vindication of policy  
15 provisions to which the insured is entitled, may be helpful to Defendant when requesting attorneys'  
16 fees in state court; it does not, however, help him in federal court where no state claim has been  
17 brought. Similarly, Cornhusker Cas. Ins. Co. v. Kachman, No. 05-026, 2009 W.L. 2853119 (W.D.  
18 Wash. 2009), does not support Defendant; that case was brought under diversity jurisdiction.  
19

20 It is lamentable that attorneys' fees are unavailable here, given Defendant's time and  
21 expense spent defending an issue that has been unsuccessfully brought in three different forums.  
22 However, assuming Defendant is successful in his action in state court, attorneys' fees may be

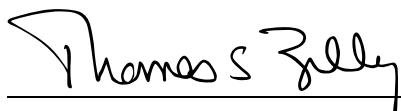
01 available under Olympic Steamship, even for efforts spent defending this action. See Axess Int'l.  
02 Ltd. v. Intercargo Ins. Co., 107 Wn. App. 713, 720 (2001).

03 **III. CONCLUSION**

04 For the foregoing reasons, the Court DENIES Defendant's Motion for Attorneys' Fees.

05 IT IS SO ORDERED.

06 DATED this 22nd day of June, 2011.

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09 Thomas S. Zilly  
10 United States District Judge  
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